

10861NAT Diploma of Aboriginal and Torres Strait Islander Legal Advocacy

THE AUSTRALIAN LEGAL SYSTEM

PART 2: THE CONSTITUTION



Acknowledgement of Country

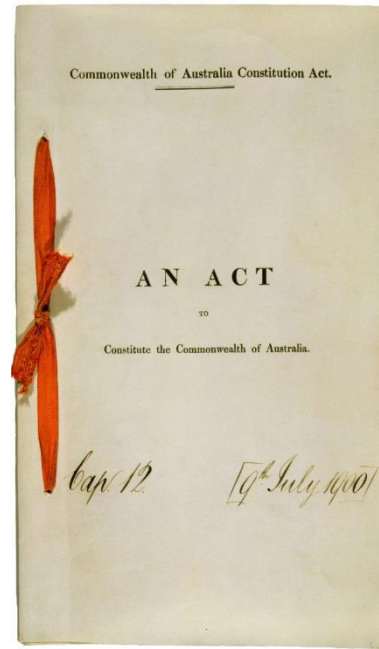
We acknowledge the traditional owners of the land on which Tranby stands, the Gadigal people of the Eora nation. We pay our respects to their Elders both past and present, who remain the traditional knowledge holders of this land.



We proudly extend this respect to all current and emerging leaders around Australia, for they hold the memories, the traditions, the culture and the future of their people.



The Australian Constitution



The Australian Constitution

- A constitution is a set of rules by which a country or state is run
- Some countries have unwritten constitutions which means there is no formal constitution written in one particular document. (e.g. England and New Zealand).
- Australia and the United States are examples of countries with a written constitution.
- The Australian Constitution establishes the composition of the Australian Parliament, describes how Parliament works and what powers it has.
- It also outlines how the federal and state Parliaments share power, and the roles of the executive government and the High Court of Australia.
- It took effect on 1 January 1901.



The Australian Constitution

- During the 1890s representatives of the 6 colonies came together at special meetings called 'constitutional conventions' to draft a constitution which would unite the colonies as one nation and provide for a new level of national government.
- Each Australian colony sent delegates to the conventions. By 1898 the delegates had agreed on a draft constitution which they took back to their respective colonial parliaments to be approved.
- The final draft of the Constitution was approved by a vote of the people who were eligible to take part in referendums held in each colony between June 1899 and July 1900.



The Australian Constitution

- The Constitution had to be agreed to by the British Parliament before the colonies could unite as a nation. An Australian delegation travelled to London to present the Constitution to the British Parliament.
- After negotiating some changes, the British Parliament passed the Commonwealth of Australia Constitution Bill in July 1900
- Queen Victoria approved the bill on 9 July 1900 by signing the *Royal Commission of Assent* and the bill became the *Commonwealth of Australia Constitution Act 1900*.
- Section 9 of this Act contained the Constitution which stated that on and after 1 January 1901, the colonies of New South Wales, Victoria, South Australia, Queensland and Tasmania would be united and known as the Commonwealth of Australia. Western Australia agreed to join the other colonies in a referendum held on 31 July 1900—2 weeks after the Act was passed.



The Australian Constitution

- [Chapter I](#) describes the composition and powers of the Australian Parliament, which consists of the Queen and a bicameral legislature with:
- Single-member representation for each electorate for the [House of Representatives](#) (currently there are 151 members)
- Multi-member representation for each state for the [Senate](#) (76 in total; 12 from each state and 2 from each territory).
- Chapter I contains [sections 51](#) and [52](#), which list most of the areas in which the Australian Parliament can make laws. The Australian Parliament can make laws on a range of issues (such as immigration and pensions), but the Constitution allows other powers (such as providing roads and transport) to remain with the states.



The Australian Constitution

- [Chapter II](#) describes the power of the most formal elements of executive government, including the Queen, [Governor-General](#) and the Federal Executive Council .
- [Chapter III](#) provides for the creation of federal courts, including the High Court of Australia, which is the final court of appeal. The High Court can interpret the law and settle disputes about the Constitution.
- [Chapter IV](#) deals with financial and trade matters.



The Australian Constitution

- [Chapters V and VI](#) outline the relationship between the Australian Parliament, and the states and territories. Importantly, s 109 in chapter 5 states that if the Australian Parliament and a state parliament both pass laws on the same subject and these laws conflict, then the national law overrides the state law. [Section 122](#) in Chapter 6 gives the Australian Parliament the power to override a territory law at any time. It also allows the Australian Parliament to make laws for the representation of the territories.
- [Chapter VII](#) describes where the capital of Australia should be and the power of the Governor-General to appoint deputies.
- [Chapter VIII](#) describes how the wording of the Constitution can only be changed by referendum.



The Australian Constitution

- Unlike the US Constitution, the Australian Constitution does not include a bill of rights.
- However, some human rights are mentioned, including:
 - the right to compensation if the government acquires your property([section 51 \(xxxi\)](#)),
 - guaranteed trial by jury for federal offences ([section 80](#)), and
 - freedom of religion ([section 116](#)).



The Australian Constitution

- The first 3 chapters of the Constitution define 3 mostly separate groups—the Parliament, the Executive and the Judiciary—and the roles they play in the governing of Australia.
- The power to make and manage Australian law is divided between these 3 groups. This division is based on the principle of the **'separation of powers'**.
- Under this principle, the power to govern should be distributed between the Parliament, the Executive and the Judiciary to avoid any group having all the power. Each group should work within defined areas of responsibility to keep a check on the actions of the others.



The Australian Constitution

- 1. Parliament: makes and amends the law (the Queen (G-G) and the two houses of Parliament)
- 2. Executive: puts the law into action (the Queen (G-G), Prime Ministers and Ministers)
- 3. Judiciary: makes judgements about the law (the High Court of Australia and other Federal courts)



The Australian Constitution

- Australia does not have a complete separation of powers because some of the roles of the Parliament, the Executive and the Judiciary overlap.
- For example, the Prime Minister and ministers are part of the Executive and the Parliament.
- High Court judges, the Prime Minister and ministers are officially appointed by the Governor-General, who is part of the Parliament and the Executive.



The Australian Constitution

➤ The role of the Governor-General

- [Section 61](#) of the Constitution states that ‘the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative’. This means that the Governor-General has been given certain powers to act on behalf of the Queen.
- While executive power is exercised by the Governor-General, in reality this is normally done on the advice of the Prime Minister and ministers, who have day-to-day responsibility for governing Australia.
- The Governor-General does not have the authority to make decisions on behalf of the government, but has a role in both the government and the Parliament.



The Australian Constitution

➤ The Constitution and the High Court of Australia

- [Section 71](#) of the Constitution established the High Court of Australia. The HCA interprets the Constitution and settles disputes about its meaning. It has the power to consider national and state laws and determine if such laws are within the powers granted in the Constitution to the relevant level of government. The High Court can invalidate any law or parts of a law it finds to be unconstitutional.
- Sometimes the High Court is asked to decide whether it is the Australian Government or a state government which has the authority and responsibility to deal with a matter. At other times, because the Constitution provides specific limits to what the Australian Government has the power to do, the High Court may be asked to decide whether a law made by the Australian Government is within that power.



The Australian Constitution

- The Australian Constitution can only be changed by referendum according to the rules set out in [section 128](#) of the Constitution. A proposed change must first be approved as a bill by the Australian Parliament before it is put to the Australian people to decide.
- A referendum is a national ballot on a question to change the Constitution. In a referendum the Parliament asks each Australian on the electoral roll to vote. To be successful, the proposed change must be agreed:
 - by the majority of people across the nation
 - by the majority of people in a majority of states.
- This is called a double majority.



The Australian Constitution

- Since the first referendum in 1906, Australia has held 19 referendums in which 44 separate questions to change the Australian Constitution have been put to the people. Only 8 changes have been agreed to.
- Successful referendums have included:
- The [1946 referendum](#) which allowed the Australian Government to provide social welfare payments, and
- The [1967 referendum](#) (in which 90.77 per cent of people voted 'yes') which gave the Australian Parliament the power to make special laws for Aboriginal and Torres Strait Islander peoples.



The Australian Constitution

- How the Constitution is interpreted has also changed and evolved, even without changes being agreed to in referendums. These changes have not changed the words of the Constitution but have been brought about by High Court decisions. For example:
- The Australian Government's power over foreign affairs ([section 51\(xxix\)](#)) has meant laws to implement international treaties can be applied to the states in areas which were previously controlled by the states alone (such as environmental protection).
- *Commonwealth v The State of Tasmania* [1983] HCA 21, (1983) 158 CLR 1 (Franklin Dam Case)



The Australian Constitution

- In the late 1970s and early 1980s the Australian Government and the Tasmanian Government fought over whether a dam should be built on the Franklin River in Tasmania. After a long campaign, the area was placed on the World Heritage List in 1982.
- The next year the High Court ruled the Australian Parliament's external affairs powers in [section 51\(xxix\)](#) of the Constitution gave it the right to honour its international treaty obligations with regard to World Heritage locations.
- This overruled Tasmania's constitutional land use rights and stopped the building of the dam.



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The Parliament and Legislative Process

